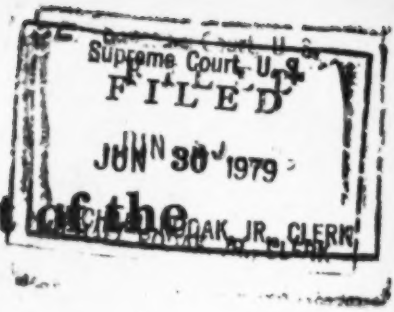

In the Supreme Court of the United States

October Term, 1978

No. 78-1946

WAYMAN O. WILKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court of the United States

October Term 1978

No. _____

WAYMAN O. WILKES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner WAYMAN O. WILKES respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in the proceeding on May 21, 1979.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto as Appendix "A". No opinion was rendered by the District Court for the Central District of California.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 21, 1979. This petition for certiorari will be filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c), since it involves post-conviction collateral proceedings under 28 U.S.C. § 2255. Such proceedings have been deemed to be "civil" cases within the meaning of the rules of the Supreme Court, so that the 90 day limit proscribed for civil cases, rather than the 30 day limit of Rule 22(2), applies: [*See United States v. Hayman,* 342 U.S. 205, 209, n. 4, 96 L.Ed. 232, 72 S. Ct. 23 (1951); *McGann v. United States,* 362 U.S. 309, 4 L.Ed. 2d 734, 80 S. Ct. 725 (1960)].

QUESTIONS PRESENTED

1. Whether the custody of petitioner, a probation violater, was imposed by the District Judge in violation of petitioner's rights to due process, when the court considered in its sentence a report of the probation officer which contained information of a nature adverse to petitioner, to which petitioner's counsel had no reasonable opportunity to respond as to why the defense felt the information was inaccurate, incomplete, and misleading.

2. Whether the mandate of Rule 32(c) (3) (a), of the Federal Rules of Criminal Procedure that:

> "Before imposing sentence, the court shall upon request, permit the defendant, or his counsel if he is so represented, to read the report of the pre-sentence investigation. . . ."

applies to a hearing on a probation violation, and if so, whether it imposes an obligation upon defendant's counsel

to request to read a pre-sentence report which he reasonably believes does not exist.

FEDERAL RULE INVOLVED

Rule 32(c) (3) (A) of the *Federal Rules of Criminal Procedure:*

> "Before imposing sentence, the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the pre-sentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which might seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon, and, at the discretion of the court to introduce testimony or other information relating to any alleged factual inaccuracy contained in the pre-sentence report."

STATEMENT OF THE CASE

Petitioner herein was convicted on January 22, 1970, of eight counts of violation of the federal controlled substances laws in the United States District Court for the Central District of California.

On February 19, 1970, the petitioner was sentenced to the custody of the attorney general on the various counts for a total of nine years, five years of which were to be suspended and petitioner was placed on five years proba-

tion to begin after completion of the first four years (C.T. 2, 3).[1]

On July 21, 1972, the petitioner completed serving the custody portion of his sentence and was placed on parole. On April 21, 1973, the petitioner's parole was completed and his five year probationary period commenced.

On February 18, 1975, petitioner was convicted by guilty plea of conspiring to commit various misdemeanors in the Los Angeles County Superior Court and pursuant to said conviction, was incarcerated in the County Jail for a period of approximately eight months (R.T.B. 73-74).[2]

On January 28, 1976, petitioner's probation officer filed a petition with the District Court alleging that the defendant, WILKES, (petitioner herein) violated his federal probation by virtue of the State conviction of February 18, 1975. The petition requested the Court to cite the defendant into Court on February 9, 1976 (C.T. 1). On February 3, 1976, Judge Whelan, the original sentencing District Court Judge, signed the order ordering the defendant into Court (C.T. 1).

On February 9, 1976, WILKES appeared in Court with counsel May 9, 1978 (R.T.B. 63, lines 1-64, line 20).

At some time prior to the May 9, 1979 hearing, the federal probation officer submitted to the Court letters dated January 6, 1978, and May 5, 1978. The latter contained statements derogatory of WILKES and persuasive of his incarceration for probation violation (C.T. 85-91). These two reports of the probation officer of January 6, 1978, and May 5, 1978, are Appendices "B" and "C", respectively, appended to this Petition. These reports of the federal probation officer are quite different. The one of January 6, 1978, is relatively innocuous. The one of May 5, 1978, dated four days before the May 9, 1978, hearing, was replete with allegations derogatory of WILKES' character.

[1] "C.T." refers to the Clerk's Transcript filed with the Court of Appeals for the Ninth Circuit.

[2] "R.T.B." refers to Reporter's Transcript prepared by Barbara Brosnan on file with the Court of Appeals for the Ninth Circuit.

On May 9, 1978, the Court sentenced petitioner to fifteen months incarceration for the probation violation and in the process made assertions derogatory to petitioner. These assertions all appear on the five pages from the Reporter's Transcript (R.T.B. 85, lines 6-88, line 7; 94, lines 11-95, line 8), which are appended to this Petition as Appendix "D".

It is these assertions of the Court to defendant (petitioner herein) in the afore five pages which were the sole basis for the statement of the Court of Appeals on page 3 of its opinion (lines 31-page 4, line 2) that:

> "At the hearing, the Court asked WILKES about some of the information contained in the letters. Although he had an opportunity to do it, WILKES did not controvert the specific information in the statements which he now asserts are erroneous."

The Court then committed petitioner to custody for 15 months, and gave him a two-week stay to put his affairs in order (R.T.B. 95, lines 9-11).

However, though the stay was in effect, petitioner by virtue of the order to return for incarceration, was in "constructive custody of the Government;" so that a motion under 28 U.S.C. § 2255(1) would lie. [(Ex parte *Fabiana*, 105 F.Supp. 139, 148 (E.D. Pa. 1952) —

holding that a letter from the U.S. Attorney to an out of country student informing him that if he did not return by a certain date to report for induction into the military he would be inducted, was a constructive custody of the Government.)][3]

Petitioner's counsel, after the sentencing hearing, found out that the assertions of the District Judge at the May 9, 1978, hearing that were derogatory of petitioner were just a few of the many allegations in the May 5, 1978, report of the probation officer to the Court that were derogatory to petitioner. (*See* declaration of petitioner counsel [C.T. 66] appended hereto as Appendix "E").

The sentence of May 9, 1978, was stayed by the District Court until June 22, 1978. In the interim, on June 15, 1978, applicant filed a motion with the District Court to reduce the sentence based upon the probation officer's inaccurate report into the Court (C.T. 45, lines 14-17). Said motion contained the affidavits of the petitioner and two of his former attorneys, including the one representing petitioner at the May 9, 1978, hearing, to the effect that the statements of the probation officer in his report of May 5, 1978, to the Court were not known about by the petitioner nor his prior attorney to the sentencing and that the contents of this report were inaccurate and prejudicial to the petitioner and the petitioner would like the opportunity to controvert them. Attached hereto as Appendices "E", "F", and "G", are each of the three affidavits.

The District Court denied defendant's (petitioner herein) motion without the Judge permitting any argument on it (R.T.B. 98, lines 12-102, line 15).

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[3]Also see *Benson v. California*, 328 F.2d 159 (9th Cir. 1964), which confirms that probation itself is constructive custody sufficient to support a writ of habeas corpus.

Thereafter, petitioner herein appealed his denial on the ground (among others) that he was in custody pursuant to a judgment imposed in violation of the Constitution and laws of the United States in that the Federal District Judge in his sentencing of petitioner ". . . relied on misinformation and denied him the opportunity to controvert that information" (Opinion of the Court of Appeals, Appendix "A" herein, page 2, lines 19-21).

REASONS FOR GRANTING THE WRIT

1. The Supreme Court's Power Of Supervision Should Be Exercised Because Of The Lower Court's Departure From The Accepted And Usual Course Of Judicial Proceedings.

Rule 32(c) (3) (A) of the Federal Rules of Criminal Procedure provides,

> "Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the pre-sentence investigation. . . ."

The Court of Appeals in its opinion has applied the aforequoted part of Rule 32(c) (3) (A) so literally as to impose an obligation upon defendant's counsel to request the reading of the pre-sentence report, even when he does not reasonably know it exists. In the instant case, the report in issue (Appendix "C" attached), was dated May 5, 1978, the hearing was May 9, 1978, and defendant's counsel was misled by a report of the same probation officer which did not have such inaccuracies dated January 1978 (Appendix "B" attached).

Such a literal interpretation is contrary to the intent of the 1975 amendment to Rule 32 (c) (3) (A). This 1975

amendment, in an attempt to help alleviate the problem of inaccurate information, altered the previous discretionary disclosure by the Court, by providing that upon request, the Court shall "permit the defendant or his counsel if he is so represented, to read the report, exclusive of any recommendation as to sentence. . . ." [Rule 32(c) (3) (A)]. Under the same amendment, the court retains the power to refuse disclosure of certain information under specified circumstances. However, when the Court refuses disclosure under these provisions, it must "state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence. . . ." [Rule 32(c)(3)(B)]. Further, Rule 32 of the Federal Rules of Criminal Procedure (c) (3) (A) also requires that the Court afford the defendant and counsel an opportunity to comment on the information in the pre-sentencing report. This is an important opportunity for the defense and should also enable appellate courts to better review alleged errors in the pre-sentence report. Those obvious purposes of Rule 32(c) (3) (A) of the Federal Rules of Criminal Procedure will be thwarted if, as in the instant case, the court imposes an obligation upon defendant or his counsel to ask to read the report of the pre-sentence investigation when he has, in fact, already read a prior report of a pre-sentence investigation and has no knowledge or reason to know that in fact there is a pre-sentence investigation report other than the one that counsel read, which was submitted to the Court a few days before the actual sentencing; as in the instant case, wherein the first report, dated January 1978, was read by petitioner's counsel and, unbeknownst to petitioner's counsel, or to petitioner, a report dated May 4, 1978, was relied on by the judge at the May 9, 1978, hearing without any mention of it to petitioner or his counsel.

The Court of Appeals, in the instant case, has discounted the prejudice to the petitioner herein in this situation because the Federal Judge, at the sentencing asked Petitioner about some of the information contained in the letters and "although" he (petitioner herein) had an opportunity to do it, WILKES (petitioner herein) did not controvert the specific information in the statements which he now asserts are erroneous." (Opinion of the Court of Appeal, 3, lines 31-4, line 2). Assuming, *arguendo,* that the aforestatement of the Court of Appeal is correct (*See* all the questions by the Court, R.T.B. 85, lines 6-88, line 7; 94 lines 11-95, line 8 — all of which appear in the Appendix to the Petition as Appendix "D"), this would not mitigate the problem, since only "some of the information contained in the letters" was asked of petitioner, and perhaps it was the information not asked of him that in some respect influenced the Court's sentence. In addition, since the petitioner chose to be represented by counsel, and in fact counsel was there, the petitioner was entitled to have the assistance of counsel in pointing out why the defense felt that the information in the probation officer's pre-sentence report was inaccurate, incomplete, and misleading [*See United States v. Tucker,* 404 U.S. 443, 30 L.Ed.2d 592, 92 S.Ct. 589 (1971); *Townsend v. Burke,* 334 U.S. 736 (1948)].

2. The Decision Below Is In Direct Conflict With Decisions Of Other Courts Of Appeal On The Same Matter Of Federal Law.

In the case of *United States v. Malcolm,* 432 F.2d 809 (2d Cir. 1970), the Circuit Court vacated the sentence of defendant because the sentencing judge may have been mistaken about the prior criminal record of the defendant whom he sentenced.

The case of *Smith v. U.S.*, 223 F.2d 750, 754 (5th Cir. 1955), concerns (to the extent pertinent in this instant case), pre-sentence information given to the District Court by an FBI agent about the defendant outside the presence of the defendant or his counsel, of a nature adverse and prejudicial to the defendant. The Court of Appeals for the Fifth Circuit, in reversing, quoted with approval from *Stephan v. U.S.*, 133 F.2d 87, 100 (6th Cir. *en banc* 1943) as follows:

> "We think, however, that such information should have been disclosed to the judge in open court and in the presence of appellant. . . . We think the interests of convicted persons about pre-sentence, is more carefully safeguarded by open hearings under such rules as the Court may adopt."

A conflict in the application of the law is especially clear in the case of *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976). The direct conflict is as follows:

1. In the *Stein* case, the defendant's attorney was not availed of the pre-sentencing report (544 F.2d 103, fn. 9). In the instant case, the probation officer, unknown to the petitioner or his counsel, submitted to the Court letters dated January 6, 1978, and May 5, 1978, the former was innocuous, the latter contained an evaluation which was adverse to the defendant. (C.T. 85-91). The record from the date that the petitioner voluntarily appeared in Court, February 9, 1976, to the date of the revocation, May 9, 1978, shows no mention of a report or letter from the probation officer (R.T.B. 1-105).

2. Immediately prior to the District Court Judge's sentencing of Stein, she unloaded on him and his counsel statements from the adverse evaluation of the probation officer (544 F.2d 100); and even after the sentence, the Judge commented that "we are not going to have any more attempted suicides or anything else, will we, Mr. Stein" (544 F.2d 100).

In the instant case, the Judge, immediately prior to sentencing defendant WILKES (petitioner herein), commented upon and questioned him with regard to specific allegations of the report (R.T.B. 85, line 11-87, line 1; 87, line 11-88, line 4); and even after the sentence, the Judge commented, ". . . but he's been holding himself out to be a doctor" (R.T.B. 94, line 11-95, line 8).

3. The appellate court, in analyzing the conduct of the sentencing judge in the *Stein* case, stated:

> "When Stein's counsel, undoubtedly taken aback by the severity of the sentence, asked to be heard (to bring to the attention of the trial court certain of its erroneous assumptions based on incorrect information) the court replied 'no, the defendant is remanded. . . ." (544 F.2d 100).

In the instant case, the petitioner's counsel, after the sentence moved to vacate the sentence on the ground that the sentencing judge acted on the basis of erroneous assumptions or on information that was materially incorrect (C.T. 43, line 26-44, line 1). The affidavits of Frank P. Rosen, petitioner's then attorney, at the revocation hearing, is in part so especially pertinent as to deserve quotation verbatim, as follows:

> "I was not aware prior to the sentence of the letter of May 5, 1978, of the probation officer of Wayman Otis Wilkes to the Honorable Francis C. Whelan (the trial judge). However, a copy of the report has now been shown to me and I feel its inaccuracies and conclusions based therein

are an outrage to our system of justice." (C.T. 66, lines 14-18).

The last paragraph of the affidavit of WAYMAN OTIS WILKES also bears quotation, as follows:

> "I know that my conduct in 1970 and prior thereto was in many ways reprehensible. However, since that time I have in every single item of my life conducted myself in a proper manner. I beg the Court to put me on the witness stand to ask me under oath any question which it might desire and go as deeply as it may desire into any aspect of my life since my transgression in 1970. Dated June 9, 1978." (C.T. 62, lines 22-28).

The declaration of Steven L. Dobbs, the attorney who represented WILKES (petitioner herein) at the State Court trial, analyzes the "criminal involvement of the defendant" and concludes as follows:

> "I feel that the recommendation of the probation officer to revoke the probation in this Court (referring to the Federal District Court) is unjust and unfair in all the circumstances." (C.T. 65, lines 17-19).

The Court in response to defendant's written motion to vacate the sentence (C.T. 41-68) made statements at the outset of the hearing precluding petitioner's counsel any argument with regard to the District Judge failing to consider significant facts and opinions which were highly relevant to the sentence (R.T.B. 98, line 12-102, line 115). The District Court Judge then utilized the small amount of time that he gave for the argument to a discussion of the issue of the Court's jurisdiction to revoke defendant's probation (R.T.B. 99, line 14-102, line 15).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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DATED: JUNE 25, 1979

APPENDIX

United States Court of Appeals For the Ninth Circuit

Memorandum No. 78-2423

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WAYMAN O. WILKES,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Before: CARTER and TRASK Circuit Judges, and SOLOMON,[1] District Judge

Wilkes appeals from an order revoking his probation and sentencing him to fifteen months in prison. We affirm.

In 1970 Wilkes was convicted of eight counts of possession and sale of stimulants or depressants. He was sentenced to four years imprisonment on some counts and consecutive five year terms on other counts. The five year sentences were suspended and Wilkes was placed on probation for a period of five years to commence after Wilkes completed his four year penitentiary sentences.

---

[1] Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX A

Wilkes completed these sentences on April 21, 1973, and at that time his period of probation commenced. During the period of probation Wilkes was indicted on a number of California state charges. Under a plea bargain, he pleaded guilty to conspiracy to commit a number of misdemeanors connected with the soliciting of children for adoption. Wilkes was sentenced to nine months confinement. He appealed his conviction to the California Court of Appeals on the ground that the statute under which he was charged and pleaded guilty was unconstitutional.

On January 28, 1976, the United States Attorney petitioned the Court to revoke Wilkes' probation because of the state conviction. On February 3, 1976, the District Court signed an order citing Wilkes into Court for arraignment on the petition to revoke his probation. Wilkes appeared with counsel six days later and acknowledged that there was a conviction but he requested a continuance to formally plead pending the resolution of his state appeal. Thereafter he asked for six more continuances. The last continuance extended the time until January 9, 1978. On that date he appeared without counsel and the Court continued the case until May 9, 1978. About a month earlier, the Supreme Court of California had affirmed his conviction. Nevertheless, Wilkes' counsel asked for a further continuance so that he could apply for certiorari to the Supreme Court of the United States. The Court denied the request. Wilkes then challenged the jurisdiction of the court to revoke his probation. When the Court rejected that challenge Wilkes admitted the probation violation. The Court, after finding that he violated his probation, reduced the sentence from five years to fifteen months.

Thereafter Wilkes again challenged the jurisdiction of the District Court to revoke his probation and sought to

have his sentence reduced. He asserted that he was deprived of due process. He also asserted that the Court relied on misinformation and denied him the opportunity to controvert that information.

Section 3651 Title 18 United States Code provides "The period of probation, together with any extension thereof, shall not exceed five years." Wilkes contends that the five year period of probation expired on April 20, 1973, and that thereafter the Court lacked jurisdiction to revoke his probation.

Wilkes concedes that if the Court had issued an arrest warrant, or if it had held a hearing on the petition before the expiration of the probation perod, the Court would have had jurisdiction. Nevertheless, he contends that the citation and appearance long before the expiration of the five years was not sufficient even though the hearing was postponed for a period of almost two years on his request and was postponed for an additional period because he appeared in Court without an attorney.

Wilkes now asserts that the Court was not required to "defer its probation hearing until after the disposition of a state charge on which the revocation was based" and that the Court could have required Wilkes' counsel to execute a specific time waiver, or could have given Wilkes an opportunity to obtain counsel, or waive counsel, within the probationary period.

In our view, the filing of the petition for revocation, the citation requiring Wilkes to appear in Court, and Wilkes' appearance in Court to answer those charges, is the equivalent of the issuance of a bench warrant or the holding of a hearing. This is particularly true when Wilkes requested and was granted repeated postponements of his hearing. *See Nicholas v. United States,* 527 F.2d 1160 (9th Cir. 1976).

Even more compelling is the fact that during the period of probation Wilkes was incarcerated in a state institution for more than eight months on the state sentence which he was apealing. During his state incarceration his probation was tolled, and his federal probation date was extended from April 20, 1973, until January 1974. "Thus, the five-year limitation is tolled during and for the time that the probationer is imprisoned for another offense." *Nicholas v. United States, supra,* at 1161, citing *Ashworth v. United States* 391 F.2d 245 (6th Cir. 1968).

This contention that the Court lacked jurisdiction to revoke probation is rejected.

The Court revoked Wilkes' probation and reduced his sentence from five years to fifteen months. Nevertheless, Wilkes contends that he should have had the opportunity to review the letters which the United States Probation Officer had sent to the Court about him. Wilkes contends that the letters contained erroneous information and he should have been permitted to controvert the contents.

At the hearing, the Court asked Wilkes about some of the information contained in the letters. Although he had an opportunity to do it, Wilkes did not controvert the specific information in the statements which he now asserts are erroneous. Rule 32(c)(3)(A), Federal Rules of Criminal Procedure, provides "Before imposing sentence the court shall upon request permit the defendants, or his counsel if he is so represented, to read the report of the presentence investigation . . ." Even if this provision applies to a hearing on a probation violation at which the probationer's sentence is reduced, Wilkes did not comply with it. There was no prejudice here.

AFFIRMED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

January 6, 1978

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Honorable Francis C. Whelan
United States District Judge
United States Courthouse
Los Angeles, California 90012

Re: WILKES, Wayman Otis
Docket No. 4697-Criminal

Dear Judge Whelan:

The above-named probationer is scheduled to appear before Your Honor on January 9, 1978, to answer why his probation should not be revoked.

This case was originally before Your Honor for sentencing on February 19, 1970, after Mr. Wilkes was found Guilty of all Counts of an 8-Count Indictment charging him with Possession for Sale and Sale of Depressant or Stimulant Drugs, in violation of 21 USC 331(q)(2) and 331 (q)(3). He was committed to the custody of the Attorney General

or his authorized representative for four years on Counts 1, 2, 7, and 8 of the Indictment, to begin and run concurrently. On Counts 3 and 4 of the Indictment, Mr. Wilkes was committed to the custody of the Attorney General or his authorized representative for five years, to begin and run concurrently and to run consecutively to the sentence of imprisonment imposed on each of Counts 1, 2, 7, and 8. Execution of the sentence of imprisonment on Counts 3 and 4 was suspended, and Mr. Wilkes was placed on probation for five years on each of the said Counts, to begin and run concurrently. Probation was to commence upon completion of the sentence of imprisonment imposed on Counts 1, 2, 7, and 8.

On February 3, 1976, a petition was filed alleging that Mr. Wilkes was in violation of his terms and conditions of probation. Specifically, on February 18, 1975, in the Superior Court of the State of California, Case A308468, Mr. Wilkes pleaded Guilty to Count 1 of an Indictment returned by the Grand Jury of Los Angeles County, which charged Mr. Wilkes with Conspiracy, Penal Code Section 182, Subdivision 1, to commit the following crimes: placing an advertisement soliciting children for adoption, Civil Code Section 224P; placing children for adoption without a license issued by the State Department of Health, Civil Code Section 224Q; operating a home-finding agency without having obtained a license from the State Department of Health, Health and Safety Code Section 1310 and 1508; and offering to pay money to a parent for placement of their child for adoption, Penal Code Section 273, Subdivision A. All crimes were deemed to be misdemeanors. On the people's motion, the allegations in Count 1, that the probationer conspired to commit various felonies, were deleted. On April 29, 1975, proceedings were suspended, and Mr. Wilkes was placed on probation for

three years on condition that he spend the first nine months in the County Jail and that he obey all laws. The probationer was granted a stay of execution to May 30, 1975, and on May 30, 1975, Mr. Wilkes commenced serving his time in custody.

However, on June 2, 1975, the probationer's appeal was filed, and bail in the amount of $2,000 was set. The probationer's appeal was dismissed, and upon motion made by the Counsel for the probationer on November 19, 1976, the Court ordered that the Order dismissing the probationer's appeal be vacated and that the appeal be reinstated. On August 23, 1977, oral arguments were made, and the Court allowed the respondent an additional ten days to file a supplemental brief and the probationer ten days thereafter to file a reply thereto. As of the date of this officer's dictation, January 3, 1978, this officer has not received any information in regard to the status of Mr. Wilkes' appeal.

Mr. Wilkes was originally cited before Your Honor on February 9, 1976, to answer why his probation should not be revoked. The case has been continued until this date, January 9, 1978, pending disposition of the probationer's appeal.

With the exception of the above-stated allegations, Mr. Wilkes has maintained his terms and conditions of probation. He has continued to work as an administrator for Signet Medical Group, Incorporated, earning in excess of $40,000 for the calendar year of 1977. It was recently learned that Mr. and Mrs. Wilkes separated in August, 1977. She advised this officer that they separated due to incompatibility. Presently, they continue to experience relationship difficulties with each other.

In the final analysis, the nature of the conviction and Mr.

Wilkes' prior criminal record suggest that he is no longer amenable to probation services.

Respectfully,

ROBERT M. LATTA
Chief U.S. Probation Officer

ALLEN E. FLORANCE
U.S. Probation Officer
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AEF:pfd

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
PROBATION OFFICE

May 5, 1978

ROBERT M. LATTA
CHIEF PROBATION OFFICER
600 U.S. COURT HOUSE
312 N. SPRING STREET
LOS ANGELES 90012

Reply to:
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Suite 315
P.O. Box 688
West Covina 91793

Honorable Francis C. Whelan
Senior U.S. District Judge
United States Courthouse
Los Angeles, California 90012

Re: WILKES, Wayman Otis
Docket No. 4697-Criminal

Dear Judge Whelan:

The above-named probationer is scheduled to appear before Your Honor on May 9, 1978, to answer why his probation should not be revoked. This matter has been continued to this date pending disposition of the probationer's appeals on a State conviction, as delineated below.

This case was originally before Your Honor for sentencing on February 19, 1970, after Mr. Wilkes was found Guilty of all Counts of an 8-Count Indictment charging him with

APPENDIX C

Possession for Sale and Sale of Depressant or Stimulant Drugs, in violation of 21 USC 331(q)(2) and 331(q)(3). He was committed to the custody of the Attorney General or his authorized representative for four years on Counts 1, 2, 7, and 8 of the Indictment, to begin and run concurrently. On Counts 3 and 4 of the Indictment, Mr. Wilkes was committed to the custody of the Attorney General or his authorized representative for five years, to begin and run concurrently and to run consecutively to the sentence of imprisonment imposed on each of Counts 1, 2, 7, and 8. Execution of the sentence of imprisonment on Counts 3 and 4 was suspended, and Mr. Wilkes was placed on probation for a period of five years on each of the said Counts, to begin and run concurrently. Probation was to commence upon completion of the sentence of imprisonment imposed on Counts 1, 2, 7, and 8.

On February 3, 1976, a petition was filed alleging that Mr. Wilkes was in violation of his terms and conditions of probation. Specifically, on February 18, 1975, in the Superior Court of the State of California, Case A308468, Mr. Wilkes pleaded Guilty to Count 1 of an Indictment returned by the Grand Jury of Los Angeles County, which charged Mr. Wilkes with Conspiracy, Penal Code Section 182, Subdivision 1, to commit the following crimes: Placing an Advertisement Soliciting Children for Adoption, Civil Code Section 224P; Placing Children for Adoption without a License Issued by the State Department of Health, Civil Code Section 224Q; Operating a Home-Finding Agency without having Obtained a License from the State Department of Health, Health and Safety Code Section 1310 and 1508; and Offering to Pay Money to a Parent for Placement of Their Child for Adoption, Penal Code Section 273, Subdivision A. All crimes were deemed to be misdemeanors. On the people's motion, the

allegations in Count 1, that the probationer conspired to commit various felonies, were deleted. On April 29, 1975, proceedings were suspended, and Mr. Wilkes was placed on probation for three years on condition that he spend the first nine months in the County Jail and that he obey all laws. The probationer was granted a stay of execution to May 30, 1975, and on May 30, 1975, Mr. Wilkes commenced serving his time in custody.

However, on June 2, 1975, the probationer's appeal was filed, and bail in the amount of $2,000 was set. The probationer's appeal was dismissed, and upon motion made by the Counsel for the probationer on November 19, 1976, the California State Supreme Court ordered that the Order dismissing the probationer's appeal be vacated and that the appeal be reinstated. On August 23, 1977, oral arguments were made, and the California State Supreme Court allowed the respondent an additional ten days to file a supplemental brief and the probationer ten days thereafter to file a reply thereto. On February 17, 1978, the California Supreme Court affirmed the order granting probation supervision, and on March 17, 1978, the Superior Court of the State of California remitted the balance of time to be served by the probationer and executed the original sentence of imposition of sentence suspended and placed Mr. Wilkes on three years probation.

The following is a summary of the above offense to which Mr. Wilkes pleaded Guilty, derived from the Los Angeles County Probation Department's Presentence Report.

In October, 1973, the probationer and Mr. Ronald Silverton, Attorney at Law, established and promoted an adoption agency called Save-a-Life. In early November, 1973, the probationer referred Ms. Katherine Loretta Brown to Mr. Silverton and their adoption agency. Ms. Brown is an ex-niece of the probationer through marriage,

and she was pregnant at the time of the referral. On or about November 6, 1973, the probationer transported Ms. Brown in an automobile from Los Angeles to Kern County for the purpose of providing Ms. Brown with medical treatment at Save-a-Life Adoption Agency, due to her pregnancy. In addition, promises of payment were made to Ms. Brown for placement of her then unborn child. Pursuant to this agreement, the probationer repeatedly paid money to Ms. Brown beginning in December, 1973, and continuing to May 3, 1974. At about this point in time, Ms. Brown was contacted by the District Attorney investigators. She cooperated with the investigators in obtaining evidence against the probationer as well as Mr. Silverton.

Additionally, it should be noted, the probationer was listed as Vice President of Save-a-Life Adoption Agency and it appears he represented himself as a retired doctor to several people in Northern California who were solicited to refer children to their agency.

On April 27, 1978, the undersigned officer contacted Deputy District Attorney Richard Moss who is the prosecutor in this matter. He stated that the above conviction is not a misdemeanor, although it involves two misdemeanor charges. The conspiracy constitutes a felony. Mr. Moss further stated that the probationer used his medical contacts in an attempt to obtain referrals for Save-a-Life Agency. Specifically, Deputy District Attorney Moss stated that the probationer approached a doctor Admiral in the Bakersfield area along with Mr. Silverton, and the probationer presented himself as a retired physician. He left a number of business cards with this doctor and solicited referrals from the doctor's clinic.

Further, Mr. Moss stated that there was also a second girl by the name of Rosemary Henry who was involved in this

scheme. Specifically, while she was residing with Mr. Wilkes, she came to a financial agreement with Mr. Silverton that she would become pregnant and put her future child up for adoption through Save-a-Life Adoption Agency.

However, it should be pointed out that Mr. Silverton made arrangements with couples wanting to adopt children, and, apparently, the probationer took no part in this end of the operation.

It should also be noted that about the time the probationer was involved in the above proceedings, Ms. Katherine Brown's house (witness) was shot into and it was alleged that the probationer may have been behind this incident. However, the police were unable to substantiate this charge.

Standing before the Court in answer to why his probation should not be revoked is a 60-year-old, four times divorced, caucasian male who has a long and extensive prior criminal record which includes violent offenses, abortion, practicing medicine without a license, intimidation of a Government witness and bribery of a Government official. On the other hand, it should be noted that since the subject's last release from State custody in October, 1976, he has maintained his terms and conditions of probation in a satisfactory manner. He continues his employment with Signet Medical Group, Incorporated, reportedly owned and operated by D. Curry-Allen, D.O., who met the probationer while he was also in custody at San Quentin Penitentiary. The probationer's salary at Signet Medical Group has continued to increase from an approximate annual earning in 1975 of $11,000 to an approximate annual earning in 1977 of $75,000. Since 1975, the Signet Medical Group has continued to expand under the administrative guidance of the probationer.

Accordingly, the probationer's responsibilities have correspondingly increased. Additionally, the probationer has been cooperative with this officer. He has reported to this officer when requested to do so and has submitted his monthly report forms each and every month and on time.

Nevertheless, in view of the elements of the offense for which he was convicted and alleged in the petition for revocation of probation, and his involvement in major criminal offenses for the last twenty years, it is our considered opinion that Mr. Wilkes no longer is amenable to probation supervision.

Respectfully,

ROBERT M. LATTA
Chief U.S. Probation Officer

ALLEN E. FLORANCE
U.S. Probation Officer
Tel. No. (213) 960-2802
(Supv. PO Stearns, 962-4140)

AEF:pfd

PORTION OF REPORTER'S TRANSCRIPT OF 5/9/78 HEARING

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THE COURT: By the way, that mandatory release too, that doesn't end parole.

MR. ROSEN: I understand.

THE COURT: In other words, parole means the end of the sentence.

Is there anything that you have to say, Mr. Wilkes, before sentence is pronounced?

MR. ROSEN: May I speak on behalf of the defendant first.

THE COURT: He has the right to do so first.

MR. ROSEN: I understand, your Honor. Do you have anything that you want to say to the Court?

THE DEFENDANT: Well, your Honor, I didn't believe at the time this act was committed that it was anything illegal about it. And all I did was recommend an ex-niece of mine to an attorney who was in the adoption practice and that's the extent of my involvement.

THE COURT: According to the probation report there were two women involved.

THE DEFENDANT: No, your Honor, there was only one. Her name was Cathy Brown.

THE COURT: What was her name?

THE DEFENDANT: Cathy Brown.

THE COURT: Was there some woman living in your home at about that same time? [86]

THE DEFENDANT: No, your Honor. No, there was not, your Honor.

THE COURT: Well, you don't have to answer these questions unless you are — you don't have to answer any questions the answer to which might tend to incriminate you. So I advise you that you don't have to answer my question. Did you know a Rosemary Henry?

THE DEFENDANT: Yes, your Honor.

THE COURT: Did you introduce her — you don't have to answer these questions.

MR. ROSEN: He is prepared to answer the questions about that issue of the state.

THE COURT: Did you refer Rosemary Henry to Mr. Silverton?

THE DEFENDANT: No, I did not, your Honor.

THE COURT: Do you know if she talked to Mr. Silverton?

THE DEFENDANT: I understand she did, your Honor.

THE COURT: Did you suggest to her that she talk to Silverton?

THE DEFENDANT: I beg your pardon, your Honor.

THE COURT: Did you suggest —

THE DEFENDANT: No, your Honor, I did not. I didn't know that she had talked to him. I did not even know that she had talked to him. [87]

THE COURT: Well, anything further that you wish to say?

THE DEFENDANT: Well, all I can say is, your Honor, I am sorry that this all came about and I had no intention of violating any laws. That would have been foolish, being on probation, to even think about violating the law. And I didn't think that an attorney would be doing anything illegal. I don't think it's been decided yet whether —

THE COURT: Did you use cards, calling cards that referred to you as a doctor?

THE DEFENDANT: I think Mr. Silverton handed out some cards. He wanted me to tell my doctor friends about his practice. That is the extent of it.

THE COURT: You never had any cards printed with your name on it and calling you a doctor?

THE DEFENDANT: Mr. Silverton, I think, had some identical cards to his printed, yes, with my name on it.

THE COURT: You knew he had them, didn't you?

THE DEFENDANT: Yes.

THE COURT: You knew that he was going to use them, didn't you?

THE DEFENDANT: I didn't sanction it. [88]

THE COURT: What did you tell him about not using it?

THE DEFENDANT: I didn't discuss it with him. I did not discuss it with him,, your Honor.

THE COURT: Do you have anything further to say?

THE DEFENDANT: That is all your Honor.

THE COURT: Do you have anything to say in his behalf, Mr. Rosen?

MR. ROSEN: Yes, your Honor, a few points that I should like to call to the attention of the Court. I realize that they may be self-serving but they are circumstances that I think the Court should be aware of.

As your Honor is probably aware, I did not represent Mr. Wilkes in the matter below. There were —

THE COURT: You mean at the original one where he pleaded?

MR. ROSEN: At the trial level, yes, your Honor.

THE COURT: I mean where he pleaded guilty?

MR. ROSEN: That's correct. It is my understanding — First of all, let me call to the Court's attention a matter that happened. When I was called into the case to handle the appeal I was the third attorney. The first attorney had filed a notice of appeal. This is just one example that I want to call to the attention of the [89]
Court. He had filed a notice of appeal in Mr. Wilkes' name in pro per with the attorney's address on it in the upper left-hand corner. That attorney had moved his office subsequent to that notice being filed and had not left a forwarding address.

Mr. Wilkes was out on an appeal bond at that time.

The transcripts not having reached Mr. Wilkes nor his attorney by the clerk, the necessary documents not having been filed, that matter was dismissed.

THE COURT: Of course, I know that because when I first saw you in this matter I was told.

MR. ROSEN: I wasn't sure the Court was aware of it.

THE COURT: I remember, but he did get the right to appeal.

MR. ROSEN: After serving eight and a half months. He served eight and a half months of his nine-months sentence that the Court had imposed.

What I am trying to bring out to the Court, the attorney below, when I read these transcripts, I was convinced that perhaps the matter wasn't handled properly. However, I did not believe that there were enough facts before me in the transcripts to allege one of the grounds as incompetence of counsel.

* * *

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THE COURT: How long?

MR. ROSEN: I would think that it would take approximately three weeks for him to get his affairs in order. Your Honor knows that he has been —

THE COURT: What business is he in?

MR. ROSEN: He is working for a medical clinic, for a medical group that have numerous clinics throughout the country. He is an administrator.

THE COURT: Why isn't two weeks enough?

MR. ROSEN: I think it would probably take more than three weeks, your Honor, to get his affairs in order. The medical group relies on Dr. Wilkes. He

trained to replace him to know all of these matters that are involved. He has personal matters with his family that he has to take care of.

THE COURT: Just a minute. Will you read me counsel's last statement.

(Record read.)

THE COURT: Did you hear what I was hearing?

MR. ROSEN: I realize that, your Honor. That is a slip of the tongue. I know that he is not a doctor but I have —

THE COURT: I know, but he's been holding himself out to be. [95]

MR. ROSEN: Not to me, not to me, your Honor. I get telephone messages and the messages say "Mr. Wilkes." I have been through this —

THE COURT: I am not saying known to you as but known to others as.

MR. ROSEN: I don't believe that is true. I believe I picked this up from the transcripts, your Honor.

THE COURT: His sentence is stayed, the execution of sentence is stayed until 11:00 o'clock a.m. on Tuesday, May 23rd.

The defendant is ordered to surrender himself on or before that date and that time to the United States Marshal on the Main Street floor of this building. Very well.

AFFIDAVIT OF FRANK P. ROSEN

COUNTY OF LOS ANGELES

ss.

STATE OF CALIFORNIA

I, FRANK P. ROSEN, depose, swear and say:

That I represented WAYMAN OTIS WILKES at the Federal probation revocation hearing of May 9, 1978, before the Honorable FRANCIS C. WHELAN. I was shocked, astonished, and dismayed that my client WAYMAN OTIS WILKES was on the basis of a State Court conviction which to this time is not final, given an extremely harsh and severe sentence. This opinion is based upon my having read the complete trial transcript of this State proceedings, and having intimate and in detail knowledge of all of the alleged misconduct of Mr. WILKES.

I was not aware prior to the sentence of the letter of May 5, 1978, of the probation officer of WAYMAN OTIS WILKES to the Honorable FRANCIS C. WHELAN. However, a copy of this report has now been shown to me and I feel its inaccuracies and conclusions based thereon are an outrage to our system of justice. I feel that a reconsideration and reduction of the severe sentence to Mr. WILKES is called for in the interests of justice.

DATED: JUNE 13, 1978

FRANK P. ROSEN

Subscribed and sworn to before me this
13th day of June, 1978

Mable Manning, Notary public

AFFIDAVIT OF STEVEN L. DOBBS

COUNTY OF LOS ANGELES

ss.

STATE OF CALIFORNIA

I, STEVEN L. DOBBS, being duly sworn, depose and say:

1. That if called upon to testify under oath, I could and would testify competently to the following.

2. That I was the attorney of record representing WAYMAN OTIS WILKES in the Superior Court of the State of California wherein he was a co-defendant with RONALD R. SILVERTON arising out of an indictment wherein they were charged in operating an adoption service.

3. After consultation and study of the Grand Jury transcript, I was of the opinion that my client WAYMAN OTIS WILKES did nothing that was either immoral or illegal; however, because RONALD R. SILVERTON, who was an ex-attorney and who was in pro per, I came to the conclusion that the trial would be a prolonged and expensive proceeding. As a matter of fact, there was a total of three trials over a period of three years. The first one took more than eight weeks, and as a result RONALD R. SILVERTON, the prime defendant, was convicted of one infraction, to wit: a misdemanor that required no criminal knowledge or mensrea, but was convicted for violating a statute wherein he placed an ad soliciting persons who desired information concerning an alternative to an abortion. Under this misdemeanor statute, one may not place an ad giving information concerning an adoption unless they first obtain a valid adoption agency license. My client's involvement, I would estimate was less than 1% of the entire proceeding.

4. At the time of the entry of the guilty plea of one count on behalf of WILKES, it was agreed with the Court

that he may apply for the work furlough program, however, my client was called as a prosecution witness and on the witness stand testified truthfully that even though he plead guilty, he felt he did nothing wrong morally, being of the option that there should be an alternative to abortions. This possibly could be the reason that the Court thereafter sentenced him to nine months in the County Jail; however, the Court did recommend the work furlough program. The work furlough committee, however, because of my client's past record, refused to permit him on a work furlough, and thereby my client served the sentence in the County Jail being a model prisoner.

5. Despite the record of my client prior to 1970, I am of the opinion that he has been since that time a useful and productive member of our society, and that knowing the facts of the Superior Court case, I feel that the recommendation of the Probation Officer to revoke the probation in this Court is unjust and unfair on all the circumstances.

I am willing to submit myself to examination and cross-examination by this Court and the United States Attorney if necessary, and will appear if called upon to do so.

DATED: June 13, 1978.

STEVEN L. DOBBS, Affiant

Subscribed and sworn to before me
this 14th day of June, 1978.

NOTARY PUBLIC in and for said State

AFFIDAVIT OF WAYMAN OTIS WILKES

STATE OF CALIFORNIA

ss.

COUNTY OF LOS ANGELES

I, WAYMAN OTIS WILKES, being under oath, swear, depose and say:

That since my release from incarceration on July 21, 1972, I have maintained and comported myself as a good citizen and a good and productive member of society. I have held one job since then as an assistant adminstrator for Dr. Curry Allen. I have paid all of my obligations and have supported myself and those near and dear to me.

In 1974, I met RONALD R. SILVERTON, who was commencing Save-A-Life Adoption Service. This service had as its object the offering of a choice of an adoption to pregnant women who otherwise would obtain an abortion. This service consisted of facilitating the natural mother's own adoption by presenting to them descriptions of adopting parents. This service would also pay medical expenses for them and would pay for an attorney of their choice who would represent them in court for the approval of the adoption. I was assured by the president, RONALD R. SILVERTON, who had been practicing lawyer for 16 years, as well as having been Crime Commissioner of Los Angeles County, that the matter was completely legal. I had been so assured by three other attorneys. To this minute, RONALD SILVERTON still maintains that there was not one item of immoral or illegal conduct in connection with this program. However, Mr. SILVERTON was indicted and charged with fourteen counts ranging from slavery to putting an ad in the paper. I was also charged with many of these counts.

On the assurance of my attorney that I would receive no incarceration, either as a result of Federal probation

revocation or State sentence, I pled guilty to conspiracy to commit various misdemeanors associated with placing children for adoption. My only connection with the case was that I offered to assist Mr. Silverton in bringing to the attention of abortion clinics, and those doctors performing abortions, that they should present this alternative to the persons who went to them for abortions. I did introduce Mr. SILVERTON, to my niece, and she did enter into the program. Mr. SILVERTON, as of this date, almost four years from the indictment of July 1974 has not been incarcerated with regard to any of these matters and has sustained a final conviction only with regard to putting an ad in the paper requesting persons with a pregnancy problem to contact his organization for information. In convicting him of this violation, the jury was instructed by the judge that the violation was one requiring no criminal state of mind, but only the conduct itself.

Because of my prior record, the work-furlough program which the judge recommended for me, did not accept me. Thus, I was incarcerated by the State Court for a period of 8½ months.

I know that my conduct in 1970 and prior thereto was in many ways reprehensible. However, since that time I have in every single item of my life conducted myself in a proper manner. I beg the Court to put me on the witness stand to ask me under oath any question which it might desire and go as deeply as it may desire into any aspect of my life since my transgressions of 1970.

DATED: JUNE 9, 1978 _____

WAYMAN OTIS WILKES

Sworn to and subscribed before me
this 9th day of June, 1978.

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MABLE MANNING, Notary Public (SEAL)